

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUNEARTH INC., et al.,  
Plaintiffs,

v.

SUN EARTH SOLAR POWER CO.,  
LTD., et al.,  
Defendants.

Case No. 11-cv-04991-CW

ORDER DENYING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE  
MOTION FOR RECONSIDERATION

(Dkt. No. 240)

On August 23, 2017, Plaintiffs SunEarth Inc. and The Solaray Corporation filed a motion for leave to file a motion for reconsideration of the Court's August 22, 2017 Order (Docket No. 239). The August 22, 2017 Order denied Plaintiffs' Bill of Costs (Docket Nos. 236 and 237) and held that the Court's April 14, 2014 Order (Docket No. 195)<sup>1</sup> continues to govern the award of costs. Docket No. 239 at 3-4. On September 5, 2017, Defendants NBSolar USA Inc. and Sun Earth Solar Power Co., Ltd. filed an

<sup>1</sup> The Court's April 14, 2014 Order held that Federal Rule of Civil Procedure 68 barred Plaintiffs from taxing any costs incurred after Defendants made an offer to settle the case on April 2, 2012, and ordered Plaintiffs to reimburse Defendants for their post-offer costs. Docket No. 195 at 10.

1 opposition.<sup>2</sup> Having considered the papers, the Court DENIES  
2 Plaintiffs' motion.

3 Plaintiffs claim that the Court should reconsider its August  
4 22, 2017 Order because it is contrary to law.

5 Plaintiffs first argue that the Court's order overlooked  
6 controlling Ninth Circuit authority, California Union Ins. Co. v.  
7 American Diversified Savings Bank, 948 F.2d 556, 567 (9th Cir.  
8 1990), which states that "an order fixing costs in the district  
9 court, while an appeal was pending, 'should be considered an  
10 inseparable part' of the pending appeal." Because this case was  
11 not presented to the Court before it issued the August 22, 2017  
12 Order, reconsideration on this basis is not warranted. See Civ.  
13 L.R. 7-9(b)(3) (requiring reconsideration where the Court failed  
14 "to consider material facts or dispositive legal argument which  
15 were presented to the Court"). Moreover, this case merely holds  
16 that a court of appeal may review an order fixing costs along  
17 with the underlying judgment. See California Union Ins. Co., 948  
18 F.2d at 567; see also Twentieth Century Fox Film Corp. v.  
19 Goldwyn, 328 F.2d 190, 222-23 (9th Cir. 1964) (same). This does  
20 not mean that an appeal automatically reverses an order fixing  
21 costs.

22 Plaintiffs next argue that the Court misinterpreted Amarel  
23 v. Connell, 102 F.3d 1494 (9th Cir. 1996), and its progeny. But  
24 all of the cases cited by Plaintiffs make clear that "reversal of  
25 the district court's judgment . . . operates to reverse the

---

26  
27 <sup>2</sup> Defendants filed this response to Plaintiffs' Civil Local  
28 Rule 7-9 motion even though Defendants recognized that the rule  
"provides that no response need be filed, unless otherwise  
ordered by the Court." Docket No. 241.

1 district court's award of costs." Id. at 1523 (emphasis added);  
2 see also R & R Sails, Inc. v. Ins. Co. of Pennsylvania, 673 F.3d  
3 1240, 1248 (9th Cir. 2012) ("Our reversal of the district court's  
4 judgment on R & R's claims necessitates reversal of the district  
5 court's award of costs as well.") (emphasis added). Here, there  
6 was no reversal of the judgment; instead, the Ninth Circuit  
7 affirmed the judgment and remanded the issue of attorneys' fees.  
8 Accordingly, the order fixing costs still stands.

9 Even if the Court were to reconsider the April 14, 2014  
10 Order, the Court's ruling would be the same. Plaintiffs claim  
11 that the Court's ruling that Federal Rule of Civil Procedure 68  
12 bars Plaintiffs from taxing any costs incurred after Defendants'  
13 April 2, 2012 offer to settle is no longer valid because  
14 Plaintiffs recovered an additional \$7,835.00 in attorneys' fees  
15 while the case was on appeal at the Ninth Circuit. Motion at 6.  
16 But the Court's order made clear that attorneys' fee awards  
17 should not be considered as part of the value of the final  
18 recovery in this case. April 14, 2014 Order at 6 (citing Marek  
19 v. Chesny, 473 U.S. 1, 9 (1985) (holding that attorneys' fees  
20 should not factor into the Rule 68 calculation of the final  
21 recovery unless the suit's underlying statute defines attorneys'  
22 fees as "costs.")). The Ninth Circuit awarded fees on appeal  
23 because of Defendant's "dilatory" conduct and maintenance of a  
24 "meritless cross-appeal" (Docket No. 235 at 8), not because of a  
25 statutory fee-shifting provision. The additional attorneys' fees  
26 awarded on appeal therefore do not change the Court's April 14,  
27 2014 ruling.

28 The Court has considered the remainder of Plaintiffs'

1 arguments but finds that they have already been addressed by  
2 previous orders or are otherwise meritless. Accordingly,  
3 Plaintiffs' motion for leave to file a motion for reconsideration  
4 (Docket No. 240) is DENIED.

5 IT IS SO ORDERED.

6  
7 Dated: September 13, 2017



---

CLAUDIA WILKEN  
United States District Judge

United States District Court  
Northern District of California